Land and Environment Court

New South Wales

Case Name:	Alexandrou v Valuer General of NSW
Medium Neutral Citation:	[2020] NSWLEC 139
Hearing Date(s):	16 September 2020
Date of Orders:	14 October 2020
Decision Date:	14 October 2020
Jurisdiction:	Class 3
Before:	Pain J
Decision:	See [119] of judgment
Catchwords:	VALUATION OF LAND – consideration of Strata Scheme Development Act 2015 irrelevant to hypothetical valuation of vacant land required by Valuation of Land Act 1916
Legislation Cited:	Interpretation Act 1987 (NSW) s 33 Land Tax Management Act 1956 (NSW) ss 3, 7, 9, 9B, 14, 15, 35, Pt 5, Pt 7 Strata Scheme Development Act 2015 (NSW) ss 3, 4 Taxation Administration Act 1996 (NSW) ss 14, 16A Valuation of Land Act 1916 (NSW) ss 4, 6, 6A, 8, 14A, 14CC, Pt 2 (s 26AA), Pt 3 (ss 29-35, 35AA, 36), Pt 4 (ss 37, 40), ss 47, 48, 61 Valuation of Land Amendment Act 2000 (NSW) s 5, Sch 3
Cases Cited:	Barrett v Valuer General [2015] NSWLEC 1141 Commonwealth Custodial Services Ltd as Trustee for Burwood Trust Fund v Valuer-General (NSW) (2006) 148 LGERA 38; [2006] NSWLEC 400 Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation (1981) 147 CLR 297; [1981] HCA 26

Gollan v Randwick Municipal Council (1961) 6 LGRA 275; [1961] AC 82
Kogarah Town Centre Pty Limited v Valuer General (No 3) [2014] NSWLEC 1124
Limina Holdings Pty Ltd ITF Galileo Superannuation Fund v Valuer General of New South Wales [2019] NSWLEC 110
MacAlister v The Queen (1990) 169 CLR 324; [1990] HCA 15
Maurici v Chief Commissioner of State Revenue (2003) 212 CLR 111; [2003] HCA 8
Maurici v Chief Commissioner of State Revenue (2005) 58 ATR 332; [2005] NSWLEC 20
Minister Administering the Crown Lands Act 1989 v New South Wales Aboriginal Land Council (2018) 231 LGERA 145; [2018] NSWLEC 26
Project Blue Sky Inc v Australian Broadcasting Authority (1998) 194 CLR 355; [1998] HCA 28
Pyntoe Pty Ltd & Anor v Valuer General of New South Wales [2012] NSWLEC 1201
Robert Croft Holdings Pty Ltd v Valuer General [2018] NSWLEC 190
Roden v Bandora Holdings Pty Ltd (2015) 213 LGERA 103; [2015] NSWLEC 191
Spencer v The Commonwealth of Australia (2010) 241 CLR 118; [2010] HCA 28
Storage Equities Pty Ltd v Valuer-General (2013) 94 ATR 431; [2013] NSWLEC 137
Stubberfield v Valuer-General (1991) 69 LGRA 133; [1991] 1 QdR 278
SZTAL v Minister for Immigration and Border Protection (2017) 262 CLR 362; [2017] HCA 34
Taylor v Owners - Strata Plan No 11564 (2014) 253 CLR 531; [2014] HCA 9
Toohey's Ltd v The Valuer-General (1924) 25 SR (NSW) 75
Triguboff v Valuer General (2009) 166 LGERA 128; [2009] NSWLEC 9
Trust Company Limited ATF Opera House Car Park Infrastructure Trust No 1 v Valuer-General (2010) 178 LGERA 1; [2010] NSWLEC 161
Valuer-General v Fivex Pty Ltd (2015) 206 LGERA 450; [2015] NSWCA 53

Texts Cited:	Cordell Costs Guide, CoreLogic (online) D Pearce, Statutory Interpretation in Australia (9th ed, 2019, LexisNexis Butterworths) Julie Walton, Report of inquiry into operation of Valuation of Land Act (1999, NSWGPS) Rawlisons Australian Construction Handbook (38th ed, 2020) Strata Schemes Development Bill 2015 (NSW) Valuation of Land Amendment Bill 2000 (NSW)
Category:	Principal judgment
Parties:	Giovanna Alexandrou (First Applicant) James Alexandrou (Second Applicant) Valuer General of NSW (Respondent)
Representation:	COUNSEL: A Ragusa, agent (First & Second Applicants) M Carpenter (Respondent) SOLICITORS: N/A (First & Second Applicants) Crown Solicitor's Office (Respondent)
File Number(s):	19/330739

JUDGMENT

1 The Applicants appeal against a land valuation assessment by the Valuer General of NSW (Valuer General) as required by s 6A(1) of the *Valuation of Land Act 1916* (NSW) (VL Act) as at 1 July 2018. The Applicants are one of 14 owners of a unit in a strata scheme at 45-49 Gladstone Street, Kogarah. They appeal pursuant to s 37(1) of the VL Act. The appeal is a hearing de novo and fresh evidence can be relied on, the Court not being restricted to material prepared by or for the Valuer General at the time the land value assessment under challenge was made. The powers of the Court in such an appeal are identified in s 40 of the VL Act. The Applicants were represented by their non-legally qualified agent Dr Ragusa. Their appeal seeks to rely on the *Strata Scheme Development Act 2015* (NSW) (SSD Act) which it is argued limits the amount of development that should be considered by the hypothetical development requirements of s 6A(1) of the VL Act, the first time such an issue

has been argued in this Court so far as I am aware. No case in which such an approach has been taken under the VL Act has been identified by any party.

2 The core of the Applicants' complaint is that the hypothetical land valuation required by the VL Act was based on up-zoning of the land in 2017 to high density residential with a floor space ratio (FSR) of 4:1 from the previous FSR of 1:1. The Applicants, relying on the SSD Act, say this has resulted in the market value being less than the land value, yet the latter is what is taken to be the value of their property. They consider the land value of the vacant land and ultimately their unit when the land value is divided by 14 should be lower.

Legislation

Valuation of Land Act 1916 (NSW)

3 Relevant provisions of the VL Act provide:

> **Part 1 Preliminary**
>
> **6A Land value**
>
> (1) The land value of land is the capital sum which the fee-simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a bona-fide seller would require, assuming that the improvements, if any, thereon or appertaining thereto, other than land improvements, and made or acquired by the owner or the owner's predecessor in title had not been made.
>
> (2) Notwithstanding anything in subsection (1), in determining the land value of any land it shall be assumed that:
>
> > (a) the land may be used, or may continue to be used, for any purpose for which it was being used, or for which it could be used, at the date to which the valuation relates, and
> >
> > (b) such improvements may be continued or made on the land as may be required in order to enable the land to continue to be so used,
> >
> > but nothing in this subsection prevents regard being had, in determining that value, to any other purpose for which the land may be used on the assumption that the improvements, if any, other than land improvements, referred to in subsection (1) had not been made.
>
> …
>
> **Part 2 Valuations and rolls**
>
> …
>
> **26AA Valuation of strata parcel**

(1) If the Valuer-General makes a valuation of a strata parcel, the parcel must be valued:

(a) as a single parcel, and

(b) as if it were owned by a single owner.

(2) For the purposes of the valuation and all purposes incidental to the valuation, including objection to the valuation, the parcel and all improvements on the parcel are taken to be owned by the owners corporation and by no other person.

(3) From the registration of a strata plan until a valuation of the parcel showing the owners corporation as owner becomes effective for rating and taxing purposes, the valuation in force is taken to be a valuation of the parcel made by the Valuer-General as if the owners corporation were shown as owner on that valuation.

(4) The Valuer-General is not, for the purposes of the making, levying, imposition, assessment or recovery of rates or taxes, required to make separate valuations of any parts of a parcel otherwise than if the parcel were owned by a single owner.

(5) In this section:

owners corporation, in relation to the valuation of a strata parcel, means the owners corporation of the strata scheme under the *Strata Schemes Development Act 2015* in which the parcel is comprised.

strata parcel means a parcel within the meaning of the *Strata Schemes Development Act 2015*.

strata plan means a strata plan within the meaning of the *Strata Schemes Development Act 2015*.

…

Part 3 Notices and objections

29 Notice of valuations to owner

(1) On furnishing a valuation list to the council of a local government area, the Valuer-General must cause notice of each valuation contained in the list to be given to:

(a) the owner of the freehold estate in the land, and

(b) any lessee or occupier of the land who, under any Act, is liable to pay any rate or tax to a rating or taxing authority in respect of the land, and

(c) any lessee of the land under a written lease for a term exceeding 3 years who, under the lease, is liable to pay the whole or any part of any rate or tax to a rating or taxing authority in respect of the land, and

(d) any mortgagee in possession of the land.

(2), (3) (Repealed)

(3A) A person to whom the Valuer-General has given written notice under subsection (1) may lodge with the Valuer-General written objection to any such valuation.

(3B) A person who objects to a valuation must notify each other person to whom notice of the valuation is required to be given under subsection (1):

(a) of the fact that he or she has made such an objection, and

(b) of the reasons for which he or she has made the objection.

(3C) In subsections (3A) and (3B), a reference to a valuation includes a reference to an allowance or apportionment factor and to the Valuer-General's refusal to determine an allowance or apportionment factor.

(4) Where the Crown is liable to pay rates in respect of any land, the notice of valuation in respect of such land shall be sent to such person as the Treasurer may notify to the Valuer-General, or to such person as may be prescribed, and such person may object to such valuation.

…

Part 4 Appeals to Land and Environment Court

Division 1 Appeals

…

40 Powers of Land and Environment Court on appeal

(1) On an appeal, the Land and Environment Court may do any one or more of the following:

(a) confirm or revoke the decision to which the appeal relates,

(b) make a decision in place of the decision to which the appeal relates,

(c) remit the matter to the Valuer-General for determination in accordance with the Court's finding or decision.

(2) On an appeal, the appellant has the onus of proving the appellant's case.

Strata Scheme Development Act 2015 (NSW)

4 Relevant provisions of the SSD Act provide:

Part 1 Preliminary

Division 1 Introduction

…

3 Main objects of Act

The main objects of this Act are to provide for—

(a) the subdivision of land, including buildings, into cubic spaces to create freehold strata schemes and leasehold strata schemes, and

(b) the way in which lots and common property in strata schemes may be dealt with, and

(c) the variation, termination and renewal of strata schemes.

…

Division 2 Interpretation

4 Definitions

(1) In this Act—

…

strata plan means a plan that is registered as a strata plan, and includes any information, certificate or other document required by this Act or the regulations to be included with the plan before it may be registered.

…

strata scheme means—

(a) the way a parcel is subdivided under this Act into lots or lots and common property, and

(b) the way unit entitlements are allocated under this Act among the lots, and

(c) the rights and obligations, between themselves, of owners of lots, other persons having proprietary interests in or occupying the lots and the owners corporation, as conferred or imposed under this Act or the *Strata Schemes Management Act 2015*.

Jurisdiction to hear appeal

5 At an earlier stage of the proceedings, the jurisdiction of the Court to hear the appeal was raised by the List Judge in light of s 26AA of the VL Act. For the following reasons provided by the Valuer General the Court has jurisdiction to consider this appeal. The reasons are set out verbatim and in their entirety.

Valuation of Land Act 1916 (NSW)

6 Section 26AA is a machinery provision in Pt 2 of the VL Act. It is not within Pt 3, which is the part that enables objection and appeal rights.

7 The general role of the Valuer General is to: (a) exercise functions with respect to the valuation of land in the State; (b) ensure the integrity of valuations under the VL Act; and (c) be the custodian of the “Register of Land Values”: VL Act

s 8(4). The Register of Land Values is defined in s 4 of the VL Act to mean the "Register of Land Values referred to in s 14CC" of that Act.

8 The council of a local government area and the Chief Commissioner of State Revenue are rating and taxing authorities: VL Act s 47.

9 The Valuer General furnishes each rating or taxing authority with a valuation list containing such information entered in the Register of Land Values: VL Act s 48(1). In the case of the Chief Commissioner of State Revenue, the list is to be furnished before 31 December each year: VL Act s 48(2)(a).

10 The rating or taxing authority uses the valuation list (and any supplementary list) furnished by the Valuer General as the basis of its rate or tax in respect of any land included in such a list: VL Act s 61.

Land Tax Management Act 1956 (NSW)

11 Section 9(4) of the *Land Tax Management Act 1956* (NSW) (LTM Act) provides:

> The land value of land, in relation to a land tax year, is the value entered in the Register as the land value of the land as at 1 July in the previous year.

12 Section 3 of the LTM Act is the definition section. It provides:

> ***Register*** means the Register of Land Values kept under s 14CC of the *Valuation of Land Act 1916.*

13 Sections 7, 9B, 14(1) and 15 of the LTM Act are also relevant to consider. Section 7 provides:

> Land tax at such rates as may be fixed by any Act is to be levied and paid on the taxable value of all land situated in New South Wales which is owned by taxpayers (other than land which is exempt from taxation under this Act).

14 Section 3 provides:

> ***Taxpayer*** means any person chargeable with land tax.

15 Section 9B provides:

> (1) Land tax, in the case of land subject to the *Strata Schemes Development Act 2015* is to be levied and paid in respect of each lot comprised in a parcel.
>
> (2) For the purposes of this Act-

(a) the land value of a lot comprised in a parcel is an amount that bears to the land value of the parcel (within the meaning of section 9 (4)) the same proportion as the unit entitlement of the lot bears to the aggregate unit entitlement, and

(b) the average value of the lot is to be ascertained on the basis of the land value of the lot, as determined under paragraph (a).

(3) Expressions used in this section have the same meanings as in the *Strata Schemes Development Act 2015*.

16 Section14(1) provides:

> Subject to this Act and the *Taxation Administration Act 1996,* the Chief Commissioner shall from the returns and from any other information in the Commissioner's possession or from any one or both of those sources, and whether any return has been furnished or not, cause an assessment to be made of the taxable value of the land owned by any taxpayer and of the land tax payable thereon.

17 Section 15 provides:

> A notice of assessment under s 14 of the *Taxation Administration Act 1996* in relation to land tax must include a statement as to the taxable value of the land, together with such information as to the amounts determined under the *Valuation of Land Act 1916* as to-
>
> (a) the land value (or other relevant value) of the land, and
>
> (b) any allowances or apportionment factors relevant to the land, from which the taxable value of the land has been derived.

18 There has always been a right of objection and appeal afforded to taxpayers in New South Wales to challenge the land value upon which a liability for land tax is based (see for example, *Maurici v Chief Commissioner of State Revenue* (2005) 58 ATR 332; [2005] NSWLEC 20; *Triguboff v Valuer General* (2009) 166 LGERA 128; [2009] NSWLEC 9; *Trust Company Limited ATF Opera House Car Park Infrastructure Trust No 1 v Valuer-General* (2010) 178 LGERA 1; [2010] NSWLEC 161; and *Kogarah Town Centre Pty Limited v Valuer General (No 3)* [2014] NSWLEC 1124 (*Kogarah Town Centre*).

19 Prior to the *Valuation of Land Amendment Act 2000* (NSW), Pt 5 of the LTM Act contained provisions in respect of objections and appeals and Pt 7 contained provisions in respect of valuation of land. Previously, a taxpayer's right to object to an assessment included the right to object to any land value on which the assessment was based: LTM Act s 35(1A).

20 The repeal of those parts pursuant to s 5 and Sch 3 [7] and [8] of the *Valuation of Land Amendment Act* arose as part of the recommendations in the "Report of Inquiry into Operation of the Valuation of Land Act" by Julie Walton in October 1999 (the Walton Report).

21 The Walton Report stated (at p 104):

> By arrangement with the Office of State Revenue, the Valuer-General deals with objections to land tax on the basis of valuation and makes a recommendation to the Office of State Revenue. … As in the case of objections, while the Chief Commissioner is the respondent to appeals against land tax on the basis of valuation, the defense of such appeals is handled by the Valuer-General on behalf of the Office of State Revenue by arrangement.

22 The Walton Report recommended that there needed to be an integrated approach to objections and appeals in a single system under which the Valuer General, not a taxing agency, is the respondent (Walton Report p 112).

23 The Explanatory note to the *Valuation of Land Amendment Bill 2000* (NSW) provides in the Overview of Bill:

> The object of this Bill is to amend the *Valuation of Land Act 1916* (the 1916 Act) so as: (a) to extend the provisions of that Act to valuations for the purposes of the *Land Tax Management Act 1956* (the 1956 Act), and (b) to align the valuing procedures under the 1916 Act with the valuing procedures that currently apply under the 1956 Act, and (c) to make a number of amendments by way of statute law revision.

24 Under "Outline of provisions", the following appears:

> Section 47 of the 1916 Act lists a number of rating or taxing authorities to whom the Valuer-General is required to supply valuation lists for rating and taxing purposes. Schedule 1 [33] proposes to include the Chief Commissioner of State Revenue in that list. As a consequence of the proposed amendment, the provisions of the 1956 Act with respect to land valuation (including the provisions with respect to objections and appeals) will become unnecessary, and so are proposed to be repealed by Schedule 3 [7] and [8].

25 Section 37(1) of the VL Act provides:

> Any person entitled under Part 3 to object to a valuation may appeal to the Court if the person is dissatisfied with the Valuer-General's determination of any such objection to the valuation concerned (whether or not the person was the objector).

26 Part 3 concerns notices and objections. It is only through Pt 3 that a party has rights to appeal to the Court under Pt 4. Section 26AA was inserted into the VL Act in 2015 as part of amendments made to the VL Act upon the commencement of the SSD Act. Section 26AA is a machinery provision in that it directs the manner in which a valuation of a strata parcel is to be undertaken, the key point being that it is valued as a single parcel: s 26AA(1)(a). The Valuer General is not required to make separate valuations of any parts of a parcel per s 26AA(4), notwithstanding that a taxpayer is to be taxed only on that which the taxpayer owns.

27 There are assumptions to be made in s 26AA, for example:

(a) the strata parcel is owned by a single owner (s 26AA(1)(b)) – this is demonstrated by the words *"*as if it were*";* and

(b) the parcel and all improvements on the parcel are taken to be owned by the owners' corporation and by no other person (s 26AA(2)) – this is demonstrated by the words "are taken to be".

28 Section 26AA directs the valuer as to how to value a strata parcel – as a single parcel and as if it were owned by a single owner. Importantly, s 26AA(4) provides:

> The Valuer-General is not, for the purposes of the making, levying, imposition, assessment or recovery of rates or taxes, required to make separate valuations of any parts of a parcel otherwise than if the parcel were owned by a single owner.

29 Section 26AA has no work to do in respect of jurisdiction.

30 The power to enable the Applicants to object and then to pursue an appeal is in Pt 3 of the VL Act. The VL Act Pt 3 comprises ss 29-36. Section 29(1) is expressly directed to the valuation list furnished by the Valuer General to the council of a local government area. The section is silent on the valuation list furnished by the Valuer General to the Chief Commissioner of State Revenue.

31 However, in *Kogarah Town Centre* Moore SC (as his Honour then was) and Brown C explained how an appeal by way of a land tax assessment comes before the Court at [44]-[46], [53]:

> 44 First, there is a statutory obligation placed on the Valuer General to provide a valuation list to the Chief Commissioner of State Revenue

annually. A list is also to be provided to local government authorities on a four yearly basis (subject to a possible exception not relevant in those proceedings. Those requirements are embodied in s 48(2) of the Acts.

45 In each of these five matters, the relevant values appear to have been conveyed not by a notice of valuation but by the forwarding of a land tax assessment document from the Office of State Revenue. It would appear to be reasonable to assume that these documents were generated from the list provided, with respect to each relevant base date year, to the Chief Commissioner of State Revenue as required by s 48(2)(a) of the Act. Each of those Land Tax Assessment notices contains, on the fourth page of each document, what amounts to a schedule of values showing separate and distinct values for each PID.

46 The mandating of provision of these statutory valuations triggers, by s 48(2)(a) the obligation of the Valuer General to undertake valuations of land on the basis set out in s 6A(1) that we have earlier set out. The Act specifically requires that the value of each parcel of land in the State (other than irrelevant exceptions) is to be ascertained each year, a requirement of s 14A(1). Each value ascertained by the Valuer General through the statutory processes is required to be entered into the Register of Land Values. This requirement is contained in s 14A(5).

…

53 Any person to whom a notice of valuation was given (relevantly in this case, the owner of the site) has the right to make a written objection to that valuation. In these instances, as earlier noted, the notice of valuation was contained in land tax assessments. This right is contained in s 29(3A). It is the making of an objection to the valuation pursuant to this provision that commences the statutory chain that can result in this Court acting as a judicial valuer to determine what should be the final outcome of such an objection.

32 The right to object to the issued land value based on a land tax assessment is clear in the VL Act s 35(1)(b). The VL Act s 35 provides:

> (1) Except as provided by section 35A, an objection must be lodged with the Valuer General, in accordance with the regulations, not later than 60 days after:
>
> > (a) the date of service of the notice of valuation under section 29, or
> >
> > (b) in the case of a valuation for the purposes of the *Land Tax Management Act 1956,* the date of service of the relevant land tax assessment under section 14 of the *Taxation Administration Act 1996.*

Taxation Administration Act 1996 (NSW)

33 The *Taxation Administration Act 1996* (NSW) (TA Act) s 14(1) provides:

The Chief Commissioner may issue a notice of assessment (showing the amount of the assessment).

34 Section 16A of the TA Act provides:

> The validity of a land tax assessment for a land tax year (within the meaning of the *Land Tax Management Act 1956)* is not affected by an objection or appeal under the *Valuation of Land Act 1916* in relation to a land tax assessment for a subsequent land tax year, even if the objection or appeal results in a change to a land valuation on which the earlier land tax assessment was partly based.
>
> **Note-**
>
> Under the *Land Tax Management Act 1956* land tax assessments are based on an average value of land, being an average of the land value of the land in respect of the most recent 3 land tax years. This section prevents an objection to a land tax assessment from affecting the validity of previous land tax assessments that were based on one or 2 of the same land values.

35 Section 35AA of the VL Act provides:

> (1) In the case of a valuation for the purposes of the *Land Tax Management Act 1956,* a person is not entitled to object to any valuation used as the basis of a land tax assessment if the valuation has previously been the subject of an objection, except with the permission of the Valuer-General.
>
> (2) The Valuer-General is to permit the objection only if satisfied that there are special reasons for allowing the objection to be made.
>
> (3) The fact that the person seeking to make the objection was not an owner, occupier or lessee of the land at the time that the earlier objection was made does not of itself constitute a special reason for allowing the person to make an objection.
>
> (4) This section applies whether or not the person seeking to make the objection lodges the objection within 60 days after service of the relevant land tax assessment.
>
> (5) If the Valuer-General refuses permission to make an objection under this section, the Valuer-General must give the person seeking to make the objection notice of the Valuer-General's decision.
>
> (6) A refusal to grant permission to make the objection does not give rise to a right of appeal under section 37.

36 Section 36 of the VL Act provides:

> The making of an objection under this Part or an appeal under Part 4 does not affect the valuation concerned, and rates, taxes and duties may be imposed and recovered on the basis of the valuation as if the objection or appeal had not been made.

37 The reading of the above sections of the VL Act, the LTM Act and the TA Act supports the Valuer General's position that the Applicants, as taxpayers, were entitled to object and appeal in respect of the issued land value that forms the basis of the Applicants' land tax assessment. I agree.

Valuation issues

Evidence

Applicants' evidence

38 The Applicants tendered three lay witness statements provided by owners of other units in the block at 45-49 Gladstone Street. These were read without objection although not provided in affidavit form. The witness statement of Mrs Alexandrou (the First Applicant) (Ex C) stated that she and Mr Alexandrou (the Second Applicant) do not intend to sell the unit they own. To do so would be financially disadvantageous because it would require them to discharge their current mortgage and set up a new mortgage, pay capital gains tax on the sale of the property, pay stamp duty for a new investment property, and lose levy contributions made to the strata plan capital works fund. In the future she and Mr Alexandrou intend to retire at their unit.

39 The witness statement of Mr Koukoulas (Ex A) stated that he has no intention of selling his property. The witness statement of Mr Restakis (Ex B) stated that he is a licensed real estate agent who has been working in the real estate industry since 1998. He said that when selling strata units, a purchaser is interested in several key points including strata levy amounts, distance of a unit to amenities and transport, parking facilities and number of units in a block. He is aware of the rezoning of the block of units at 45-49 Gladstone Street in May 2017. He said that when selling an individual unit, zoning does not play a part in the achievable sale price. Mr Restakis said that given the building is a block of 14 substantial units which are tightly held, consolidation is very unlikely to occur in the next 5-10 years and probably longer due to market decline and oversupply of available land which poses a more viable option to developers.

40 The Applicants tendered a bundle of six emails received from various owners of units in the block at 45-49 Gladstone Street confirming they had no intention to sell their units in the near future (Ex D). One of these emails was from Mr

Koukoulas who also provided a witness statement (see the immediately preceding paragraph).

41 The Applicants tendered documents by way of background to their case consisting of: (i) the Applicants' Class 3 Application; (ii) the Valuer General's determination dated 27 August 2019 following the Applicants' objections to the valuation; (iii) a conference file note dated 12 August 2019 documenting a conference with Property NSW at which the Applicants raised their objections; (iv) reports prepared by Mr Robinson of Real Estate Consultancy & Valuation Services Pty Ltd analysing the land values issued for the Applicants' property in 2016, 2017 and 2018; (v) a benchmark/ component report prepared by Property NSW dated 12 August 2019; (vi) a title search of Strata Plan 7610 at 45-49 Gladstone Street; and (vii) a title search for unit 3 at 45-49 Gladstone Street, showing the Applicants as joint tenants (together these documents were marked Ex G).

42 The Applicants tendered photographs of other properties in Kogarah on Stanley Street, Victoria Street, Railway Parade North and Harrow Road, and other unit blocks on Gladstone Street, being numbers 51, 55 and 63-67 Gladstone Street (together these photographs were marked Ex H).

43 The Applicants tendered a land tax assessment as at 31 December 2018 showing average land tax value of unit 3 at 45-49 Gladstone Street as $362,619. In 2017 taxable land value was $220,714, in 2018 $230,714, and in 2019 $636,429.

44 The Applicants played two short video clips. The first video was titled "subject property 45-49 Gladstone Street KOGARAH & view of street". The second video was titled "Gladstone Street KOGARAH 11 unit blocks".

45 For the purposes of these proceedings the unsworn evidence of the Applicants can be accepted as the basis for the Applicants' submissions on the unlikelihood of redevelopment of the land because of the SSD Act and the market value of the unit being approximately $635,000 (the valuation of Mr Hill suggests $835,000).

Valuer General's evidence

46 The Valuer General tendered documents concerning sales at 12-24 Stanley Street, 2-20 Stanley Street, and 18-24a Victoria Street, Kogarah (Ex 2). As identified in the Joint Expert Valuation Report (Joint Report) (Ex F), these three properties were the three common sales identified in both the valuers' reports.

47 The Valuer General also provided the Court with a copy of its policy for the valuation of high density residential land dated June 2019 (Valuer General Policy) (marked MFI-1). It states that "the current use of the property if it differs from planning controls and would, if allowed, result in a higher land value (section 6A(2))" must be considered in the valuation. It further states that the "direct comparison method of valuation should be the primary method of valuation for high density residential land".

Valuers' evidence

48 The Applicants tendered the Statutory Land Valuation Report prepared by Mr Richard Perry for the valuing year dated 1 July 2018 (the Perry Report) (Ex E).

49 The Perry Report identifies as relevant and extracts ss 6A and 26AA of the VL Act. Mr Perry adopted the residual land value method as the primary method to value the property. He states:

> I have adopted a 2 bedroom unit sales rate of $635,000 based on comparable sales of 2 bedroom units within the local area.
>
> A hypothetical purchase price for all the existing units on the property was calculated. Then an allowance per unit adopted to renovate the block to an "as new" standard.
>
> A replacement cost per metre for a new building less all the associated costs was adopted to calculate the value of the improvements on the site to arrive at a residual land value.
>
> The residual land value was calculated by deducting the value of the improvements from the hypothetical sales value.

50 The deduced adjusted residual land value arrived at was $3,406,087.

51 The Perry Report states that the "direct comparison (check method)" was also used to value the property using the maximum permissible gross floor area (GFA) of the comparable residential sites compared to the subject property, taking into account that the property is subject to an owners' corporation (see comparable sales properties above in [46]). The GFA adopted in the Perry

Report is 1,516m2. Based on an analysis of recent site sales of amalgamated sites, the Perry Report adopts a rate of $2,350/m2. The adopted rate applied to the GFA arrives at a valuation of $3,562,600.

52 The Perry Report acknowledges the difference between the two methods of assessment used being $156,513 or approximately 4.6%. Mr Perry states:

> For the purposes of this valuation I have adopted the land value of $3,400,000 as it was derived via the primary method of assessment.

53 The figure of $3,400,000 arrived at by Mr Perry when divided by the 14 units is $242,857.

54 The Valuer General tendered the Statement of Evidence prepared by Mr Derek Hill (the Hill Report) (Ex 1). Mr Hill described his valuation methodology as follows:

> 37. A statutory valuation will be required on the subject land having regard to Section 6A(1) of the Act.
>
> 38. This section of the Act assumes the land to be vacant, i.e. the building improvements are notionally removed.
>
> 39. Although the improvements are notionally removed, the permitted use of the land must be taken into account in determining the "highest and best use".
>
> 40. In my view the “highest and best use” of the subject land is as a high density residential flat building development site with off street parking.
>
> 41. This view is based upon the relevant planning controls and the appetite of the market as at the valuing year for residential unit development sites.
>
> 42. For the purposes of this report I have analysed three comparable residential unit development sites to value the subject land.
>
> 43. Furthermore, the considered “highest and best” use is consistent with the objectives of the relevant planning scheme.
>
> 44. The valuation methodology is based upon the subject land containing a developable gross floor area, GFA, of 5,918.8 square metres.
>
> 45. In the assessment of the value of the land the most appropriate method of valuation is by the “direct comparison” method. This method analyses land values and their equated GFA rates from comparable sales evidence and adjustments are made for comparability to the subject land.

> 46. Consideration has been given to, but not limited to, the size of the land holding and developable GFA, location, shape, access, views and topography in comparison from the analysed sales evidence to that of the subject land.
>
> 47. In the assessment of the GFA rate for the subject land I have analysed three development site sales.
>
> 48. I consider the use of development sites as being the preferred evidence in the assessment of land value as this either negates or limits the areas of subjectivity in the assessment of land value.

55 Based on comparable sales evidence (using the properties identified in [46] above), the rate range was $2,249/m2 to $2,491/m2, prior to adjustments. After regard was given to comparability of each of the three development site sales to the subject land, the site GFA rate range was $1,912/m2 to $2,491/m2. Mr Hill adopted a GFA rate of $2,000/m2 for the subject property.

56 Based on the GFA of 5,918.8m2 and rate of $2,000/ m2, the land value was $11,837,600. The s 6A(1) land value as at 1 July 2018 was $11,835,000. The figure of $11,835,000 arrived at by Mr Hill when divided by the 14 units is $845,357. I note that the Valuer General does not contend for that amount of land value but does maintain the land value the basis of the original valuation the subject of the appeal by the Applicants.

57 The Applicants tendered the Joint Report prepared by Mr Perry and Mr Hill dated 5 August 2020 (Ex F). On the approach to valuing the subject land, Mr Hill emphasised that land values are assessed having regard to s 6A of the VL Act which requires the major assumption that the land is vacant. Mr Perry said that the highest and best use must be “legal, physically possible and financially viable”.

58 Mr Perry provided the following reasons for disagreeing with Mr Hill’s approach:

> 30. The adoption of the site as a single owner site is not physically possible as there are currently 14 owners of the site and could only be considered a single owner site in a hypothetical assessment of land value.
>
> 31. In a hypothetical exercise as can be directly viewed from the Act, it is possible to assume that there are no improvements on the site; however, the subject site has 14 registered title owners of the site.

32. Mr Hill has made his assessment of value in his calculations with the assumption the site can be assessed under the valuer generals policy guidelines of highest and best use. Still, he has omitted to incorporate the legal and physically possible aspects of the policy, and I argue that his view [is] as a pure hypothetical development site.

33. In the assessment of land to achieve the highest and best use the relevant authorities must approve the potential development, I have received no notification of the existence of any approval.

34. It is also noted in Mr Hill's assessment there has been no allowance given to any time period that would be required to achieve the hypothetical required approvals to achieve his nominated outcome in his evaluation. As a valuer and practising real estate agent who has regularly consolidated sites, I believe from my experience and knowledge to obtain the required consents of this number of owners to agree to the development proposal may be unachievable or need many years to acquire the necessary lot numbers.

59 The valuers also differed as to their opinion on the approach to highest and best use of the subject land as at the relevant valuing year. Mr Hill commented on Mr Perry's approach as follows:

42. In this matter Mr Perry considers that a hypothetical purchaser would be required to purchase all of the fourteen, 14, strata units within the existing development upon the land prior to developing the land to achieving its "highest and best" use.

43. Mr Perry, within Section 13 of his report, considers:

> To achieve the highest and best use all apartments have to be acquired at the same time and this is not physically possible.

44. In my view this is not the correct assumption when valuing land for the purposes of assessing the value of the subject land.

45. Section 6A(1) concerns itself with the statutory value of the land only. It is based upon the assumption the land is void of any building improvements.

46. This Section of the Act does not consider the existence of any building development, in this matter the current residential strata unit development, or any other structure on the subject land.

47. The relevant Section of the Act clearly states that the improvements, other than land improvements, have not been made.

60 Both valuers adopted the direct comparison method of valuation, Mr Perry as his "check" method.

61 The residual land value method was Mr Perry's primary methodology. Mr Hill commented on that methodology as follows:

60. This type of calculation requires a wide number of assumptions and estimates that are input into the calculation model to arrive at the residual land value of the property. This method of valuation involves a large number of steps and mathematical adjustments. As this method of valuation is complex, it is also inherently subject to unreliability. The valuer must be accurate of all assumptions and estimates at the input stage.

61. Because of the many estimates and assumptions that must be made, the use of this method can be perilous as slight differences in the monetary inputs may have a dramatic effect to the residual value, i.e. the land value.

62. Therefore, I consider the "Residual Land Value" method of valuation is used as either a secondary check method of valuation or when there are no comparable sales to guide the valuer in the assessment of land value.

63. In the process in determining the value of the subject land as at the relevant valuing year I have sourced and analysed three development site sales. These sales are within proximity to the subject and are controlled by the same planning controls. Therefore, I am fortunate to have such sales evidence to rely upon in this assessment.

64. Therefore, I consider the use of the "Residual Land Value" method is not warranted in this matter.

65. I note from Mr Perry's calculations that the hypothetical development within his methodology is predicated upon 14 residential strata units. The existing strata development contains 14 units and I have assumed that he has based his starting point, being the gross realisation, upon a development on the land capable of just 14 units and with a GFA of 1,516 square metres.

66. This is a position I disagree with as a residential unit development upon the subject land, having regard to the relevant planning controls, is able to attain a developable GFA of 5,918.8 square metres, a quantum of developable area significantly greater than that put forward by Mr Perry.

Oral evidence of valuers

62 In cross-examination, Mr Hill responded to a question regarding the discrepancy between the land value and the market value as being the result of how the land valuation was undertaken in accordance with the VL Act. The land valuation assessment under s 6A is subject to a number of assumptions including that the land is deemed vacant and void of all improvements. The 14 unit blocks referred to by Dr Ragusa is an apportionment based on an existing building which the VL Act does not take into account. The land valuation is

based on the highest and best use which a hypothetical purchaser or vendor would transact upon that land if vacant.

63 In response to whether he considered that the subject land is a strata parcel in his valuation, Mr Hill said per s 26AA(4) of the VL Act, the Valuer General is to make a valuation as if the parcel were owned by a single owner. The Valuer General is not required to provide a statutory valuation of individual strata units within an existing building. That individual value is apportioned from the entirety of the land value that the Valuer General assesses.

64 Mr Hill agreed that the unit is a strata parcel purely by definition that there was a building improvement on the land that contains a strata parcel. On rezoning, Mr Hill explained that the fact that no property within Gladstone Street had been developed in light of the up-zoning in 2017 is irrelevant. When asked how the SSD Act relates to or influences the development potential of the property, Mr Hill replied that the SSD Act would have no bearing on the land value whatsoever as under the assumption of s 6A of the VL Act, the land is vacant, the land is considered freehold and therefore the SSD Act has no bearing on the land value.

65 The cross-examination of Mr Perry focussed on his experience in valuation. Mr Perry agreed that he had not given evidence in this Court before. Regarding his report, Mr Perry agreed that other members of his office contributed to the report. Mr Perry said he was not familiar with *Toohey's Ltd v The Valuer-General* (1924) 25 SR (NSW) 75 (*Toohey's* case*)*.

66 Mr Perry was taken to part of his report in which he extracted part of the Valuer General Policy (MFI-1). Mr Perry confirmed that underlining of the words "physically possible" was his addition.

67 Mr Perry did not agree that under s 6A(1) the land valued has to be devoid of all improvements. He said the use must be legal and physically and financially viable. He agreed that the words "physically possible" could relate to aspects of topography. He agreed that the assessment under s 6A(1) of the VL Act is hypothetical. He did not accept that the vendor and purchaser should be hypothetical. The owners of the hypothetical site have a huge bearing on the developability of the site.

Applicants' submissions

68 The Applicant provided written submissions, extracted in full below:

> 1. The property of the appellants is a lot (and unit) in a Strata Scheme.
>
> 2. The land which is the subject of this appeal is owned by a Strata Scheme through the Owners Corporation. This land is therefore classified, and valued. as a Strata Parcel.
>
> 3. Section 26AA of the Valuation of Land Act 2016 (VLA) deals specifically with the valuation of a strata parcel:
>
> > 26AA Valuation of strata parcel
> >
> > [extracted above at [3]
>
> 4 Section 26AA of The Valuation of Land Act therefore brings into play the Strata Schemes Development Act 2015 and all its revisions into this case.
>
> 5 Section 26AA of the VLA establishes the specific nature of the land in this case- it is a Strata Parcel.
>
> 6 This material fact- that the land is a Strata Parcel- must be considered in any valuation exercise.
>
> 7 Since we are dealing with a Strata Parcel, the provisions of the Strata Schemes Development Act (SSDA) are activated.
>
> 8 Section 3 of the SSDA sets out the main objectives of the SSDA. At 3 (c) the objective stated is "the variation, termination and renewal of strata schemes."
>
> 9 The provisions of SSDA help define the possible use of the subject land.
>
> 10 **We have closely examined the provisions of the Strata Schemes Development Act and we rely largely on those provisions for our case.**
>
> 11 **We submit that the provisions of the SSDA impose a significant restriction on the possible use of the land**.
>
> 12 **We submit that land subject to the provisions of the SSDA cannot be developed until a Strata Scheme, which is subject to the regulations of the SSDA, is extinguished.**
>
> 13 **Part 10, Sections 153 to 190 of the SSDA deals specifically with the process which is required to be completed before land owned by a Strata Scheme can be developed. (Strata Renewal Process.)**
>
> 14 According to the provisions of the SSDA, the Strata Scheme needs to be terminated before the land can be developed.
>
> 15 As a consequence, unless the Strata Scheme is terminated, the land cannot be developed.

16 It is analogous to a property subject to a Heritage order- unless and until the Heritage order is lifted, the property cannot be developed.

17 Once the existing Strata Scheme is terminated, it can be replaced by a new Strata scheme or more likely, it can be sold to a developer by a collective sale so that it can be developed.

18 An existing Strata Scheme can be terminated if there is unanimous agreement from all the Lot owners and then the land can be developed.

19 If there is not unanimous agreement by the 14 Lot owners, development of the land can only occur after a Strata Renewal Process is completed according to the provisions of the SSDA .

20 The Strata Renewal Process requires the strict adherence to a prolonged and complex process.

21 A specific Strata Renewal Committee has to be created and elect ed.

22 Many administrative steps and meetings of the regular Strata Committee, the Strata Renewal Committee and of all the owners need to take place according to a strict timetable and deadlines.

23 The Strata Renewal Process can lapse and fail at any of the steps along the way.

24 A Strata Renewal Plan needs to be prepared and presented to the owners.

25 Each owner of a Lot (and any Mortgagee or Covenant chargee registered on the Lot) can indicate their support for the Renewal Plan.

26 At least 75% of the owners are required to give their support before the Renewal Plan can progress to the next stage.

27 The final step is obtaining Court approval for an order giving effect to the Strata Renewal Plan.

28 If it is decided to apply to the Court for an order, The Court must hear the application in proceedings before the Court and then an order can be issued.

29 The Court must consider all aspects of the Strata Renewal Plan and allow dissenting owners to be a party to the proceedings.

30 It is obvious that the biggest stumbling block to the renewal process is the need for 75% of the lot owners to approve the Renewal Plan.

31 In this particular case, 11 of the 14 owners need to approve the Renewal Plan before the land can be developed. It is extremely unlikely that this can occur.

Financial feasibility

32 8 of the 14 unit owners on the subject property are owner occupiers. To these people the units they occupy are their homes, not just an investment. Supporting the Renewal Plan would mean changing

their homes and community and would be a major disruption to their lives. They would be unlikely to approve the Renewal Plan based purely on financial considerations.

33 The units in the block are tightly held. The last unit sold in the block was in November 2013.

34 This case is analogous to amalgamation of contiguous, multiple parcels of land - in this case “amalgamation” of multiple lots is required. Amalgamations are notoriously difficult even when a small number of property owners are involved. In this case 11 owners need to agree. It is virtually impossible. It could be another 50 or 100 years before the site is consolidated and developed.

35 Basically, the site is “frozen” or “sterile”- since it is a Strata Scheme it cannot be developed. It should be valued according to its existing use.

36 If there is such a dramatic increase in land value, nearly tripling, one would expect some form of widespread increase in the market value of the units in the block as well as the units in nearby blocks which have been subject to the same change in Zoning.

37 Since there was not any appreciable change in market values, the large increase in land value was clearly spurious and not realistic.

38 A written statement by Mr Restakis, an experienced Real Estate agent, supports the idea that the large change in Zoning in the area has been irrelevant and has not made any difference in determining the prices of units (Lots) in Strata Blocks. In the real world, the change in Zoning has not made any difference. The change in Zoning has not added any value.

39 Mr Restakis also states that when selling a Unit, the Zoning of the land on which the unit is located, plays no part in the marketing of the Unit. Other factors play a part- strata levies, distance to amenities, the level on which the unit is located- but not the Zoning.

40 Increase in land value should translate into increase in market value. This has not occurred. There has been very little change in the market value of units in the area.

41 This confirms the fact that the change in Zoning has not added any value to the units in the area.

42 The change in Zoning therefore, should not have resulted in changes in land values. A disconnection has occurred between market values and assessed land values. This should not be the case. Both types of values should roughly move in parallel.

43 Financial feasibility considerations add strength to the argument that the site cannot be developed. There is little incentive for the lot owners to agree to a Strata renewal.

44 Owner - occupiers, if they sell, have to pay selling agent fees and legal costs. Then they have the costs of relocation. Then they have to

pay stamp duty and legal costs to buy their replacement home. To this has to be added the intangible cost of finding their new home.

45 Owner-investors (6 out of 14), if they agree to a Strata Renewal, face considerably more costs. The first and major disincentive to approve the Renewal Plan and sell, is the prospect of realising a major Capital Gains tax liability. This could, depending on the individual circumstances of the owner-investor, virtually wipe out most of the windfall or uplift gain from selling to a developer. They then face the other expenses of agent's commission and legal costs to sell, and, if they decide to buy a replacement property, stamp duty and legal costs to buy. It is extremely unlikely that an owner - investor would consider approving the Renewal Plan and selling to a developer. There is no financial incentive to do so.

46 The building on the site is in good condition, it is old style, well established.. There is no lift to add to the maintenance costs. There are lock up garages instead of the current trend of car spaces. The Body Corporate has considerable cash reserves in the bank . Many owners favour such characteristics and would be reluctant to sell.

47 Two owners, Mrs Alexandrou and Mr Koukoulas, have provided statements indicating that they have no intention of selling their units, which would mean that they would not support any Strata Renewal Plan.

48 Four other owners- Units 2, 10, 11, 12- by Email correspondence have indicated that they have no intention to sell their units and therefore would not support a Strata Renewal Plan.

49 **We, therefore, submit to the Court that, in this case, the possibilities that a Strata Renewal Plan is completed and approved by the Court are remote. The site, therefore, cannot be considered a development site**.

Valuation by Mr Hill.

50 Mr Hill in his whole valuation has not considered the fact that we are dealing with a Strata Parcel.

51 Mr Hill has ignored completely the provisions of the Strata Scheme Development Act (SSDA) in his report. This invalidates his whole valuation.

52 The valuation by Mr Hill assigns a floor space of around 420 sqm. to each Lot owner but the value of such floor space is not available to that person. He cannot capitalise it .

53 The High-Density Valuation Policy document by the VG on page 4 states that the valuers must consider “all statutory restrictions on the land.” They have failed to do it on this occasion because they have ignored the restrictions imposed by the SSDA.

54 In the same page, they list various legislative acts that may affect land value. Inexplicably, the SSDA has been omitted.

55 In the Joint Expert Report, at points 38, 66 and 71 Mr Hill refers to “relevant planning controls.” There is no reference whatsoever to Strata Development controls.

56 Mr Hill has failed to consider all the circumstances that may affect the value of the subject land.

57 Mr Hill refers repeatedly to planning controls but he omits any reference to Strata control laws that govern the possible use of the land.

58 Mr Hill values the site as of the 1 July 2018 at $11,835,000. This equates to a figure of $845,000 per lot just for the land value alone. This should have rung alarm bells for Mr Hill. At that time, the market value of a unit in that block was assessed to be about $635,000 by Mr Perry. There is a major discrepancy between the theoretical valuation of Mr Hill and the reality of market value. This is because his valuation is faulty. He is valuing the land for what it is not- as a development site. If the land value of each Lot was $845,000, the market value of each unit should be considerably higher. But this was not the case.

59 Market value should be higher than land value since it contains an amount for the value of the improvements. It confirms that the valuation by Mr Hill is not realistic.

60 The initial valuation from the VG was $8,910,000. The valuation reached by Mr Hill is $11,835,000. The discrepancy is $2925000 (or 33% more). Mr Hill offers no explanation for this difference.

61 The valuation reached by Mr Robinson is $10,650,000. The valuation reached by Mr Hill is $11,835,000. The discrepancy is $1,185,000 (or 11% more). Mr Hill once again does not offer in his report, an explanation for this difference.

62 The valuation by Mr Hill closely resembles the valuation done by Mr Robinson except for the unexplained higher value. Since the Robinson valuation was the subject of an appeal, one would have expected from Mr Hill a more critical approach and deeper scrutiny of the subject property including statutory provisions that may affect its value.

63 On page 9 (point 39) of his report Mr Hill states that: "Although the improvements are notionally removed, the permitted use of the land must be taken into account in determining the "highest and best use". He has not done that. The land is a Strata Parcel. He has not considered that the land cannot be developed.

64 On page 14 of his report (point 66) Mr Hill states that: 'The subject land has been valued based upon its highest and best use, as a development site for residential unit uses with off street parking."

65 This is not correct. The land is a Strata Parcel. The subject land cannot be considered a development site. The site cannot be developed. He cannot use the projected GFA (Gross Floor Area) based on the new Zoning.

66 Mr Hill uses the so called “direct comparison” method for his valuation. This method is unreliable on this occasion. The comparison sales used by Mr Hill, since they are 3 development sites, a priori, are not comparable. He has ignored the fact that the land he is valuing is a Strata Parcel. He has not even made any adjustment for this. They cannot be compared to the subject property. He is comparing sales of consolidated sites ready for development with a Strata Parcel. The sites are not at all comparable.

67 We accept the concept of “hypothetical sale” but, in the real world, sales of Strata Blocks cannot occur and, therefore, truly comparable sales cannot exist.

68 Even if one were to use the sales in the respondent report, the obtained sqm rate should be multiplied by existing floor space not the theoretical one.

69 In contrast, the main valuation method used by Mr Perry, is the “residual valuation” method, which is described as the “Hypothetical Development” method in the “high density policy” publication by the VG. This method seems more appropriate in this case as it uses sales of comparable units in comparable Strata Parcels to arrive at a value for a unit in the subject property and then calculate the residual value of the land. He has compared like with like using unit sales. Two of those unit sales were in the immediate vicinity of the subject property at 55 and 63 Gladstone St.

70 Even if it was possible to develop the site, the projected GFA of 5918sqm quoted by Mr Hill based on the new Zoning represents the maximum floor space the Local Council would allow on the site. But it is not certain. That amount of floor space may not be achievable because of setbacks and overshadowing considerations. Mr Hill does not seem to have taken that into account in his report.

71 Another hurdle to developing the subject land is the contiguous site at number 51 Gladstone St. It is a small site of 683 sqm containing a small block of 4 units. This site cannot be developed on its own because of its size and street frontage. The Council may not be amenable to isolate this site by allowing a much bigger development at 45-49 Gladstone St. It may require amalgamation of the two sites before any development can take place. This is an additional impediment to the development scenario proposed by Mr Hill. Mr Hill has not taken this into account in his valuation report.

72. At point 41 Mr Hill states that: “This view is based upon the relevant planning controls and the appetite of the market as at the valuing year for residential unit development sites.”

73 Mr Hill mentions planning controls but he has once again ignored Strata controls.

74 Mr Hill writes of "market appetite for residential unit development sites." Gladstone St alone has probably 11 blocks of units. They would have all had their Zoning increased in May 2017. To this day none of

these blocks of units seems to have been acquired to become development sites. This is consistent with the virtual impossibility of developing these sites.

…

VG Submission.

76 The Respondent refers repeatedly to the concept of "highest and best use."

77 But the “highest and best use” must be “possible.”

78. In this case the “highest and best use” of the land as proposed by the Respondent is not possible since the land cannot be developed because of the restrictions of the SSDA.

79. In her submission, at p.115, the Respondent concludes that:

> By the applicants' insistence that provisions within the Strata Schemes Development Act 2015 are relevant to the statutory valuation exercise, the applicants have taken a position beyond the usual merits-based approach in class 3 statutory valuation proceedings.

80. This assigns implications to our case that are not warranted. We are not stating that the SSDA is, in any way, involved in the valuation process. We are saying that SSDA governs the possible development of the subject property.

81. We are simply saying that, because of the provisions of SSDA, the subject land cannot be developed.

82. The SSDA simply imposes a statutory restriction on the land.

83. **Our position is simply that the land cannot be developed and should not be valued as a development site.**

84. At p.70 the Respondent states that: “the valuation under the VLA has been variously described as *artificial.”* This may be so but we submit that this concept of artificiality cannot be taken to such an extreme that the valuation becomes unrealistic and unreasonable.

85. The respondents in their submission discuss at length aspects of Section 26AA of the VLA. This section of the VLA is concerned with the valuation of Strata Parcels.

86. At p.76 in their submission the respondent states: “"Where the site is vacant, there is no building, where there is no building, there is no Strata Scheme.″

87. This is incorrect. The site is being valued as Strata Parcel. Where there is a Strata Parcel there has to be a Strata Scheme. The Strata Scheme through the Owners Corporation owns the parcel and all improvements on the parcel. The Strata Scheme is not limited to ownership of the improvements *(the building),* the Strata Scheme also owns the land.

88. The definition of Strata Scheme in Section 4 of the SSDA includes: “the way a parcel is subdivided under this Act into lots or lots and common property.”

89. At p.79, the respondent says that “you must assume a sale of the subject land.” In a hypothetical sale of the subject land, the hypothetical buyer would still have to take into account the fact that the subject property is a Strata Parcel and subject to the regulations of the SSDA.

90. At p. 89 the Respondent says: “the applicants ignore the development potential permissible under the planning controls and the market evidence of sales of sites for residential unit development.” The problem with this is that all 3 sales used by the Respondent are not Strata Parcels. They are not subject to the regulations of the SSDA, only to Planning controls. The subject property is subject to **Strata controls as well as Planning controls.** That needs to considered when determining highest and best use.

91. At p.90 the Respondent quotes some previous cases. In Spencer v The Commonwealth the Respondent writes of a not anxious buyer and not anxious seller “both perfectly acquainted with the land and cognisant of all circumstances which might affect its value.” In its valuation of the subject property, the Respondent has failed to take into consideration the important circumstance that the subject property is a Strata Parcel.

92 At the same p. 90 in Stubberfield v the Respondent writes that: “what it can best be used for will be reflected in its true market which takes account of any detriment the land possesses relevant to its use.” In the current case, the Respondent has failed to take into account the important detriment posed to the subject property by the fact that it is a Strata Parcel and subject to SSDA contras.

93 At the same p.90, in Park v Allied Mortgage, the Respondent writes that: “For this purpose the valuer will take into account not only its present use to which the land is applied, but any more beneficial use to which it may reasonably be applied.” We submit that the subject property cannot be reasonably applied to any more beneficial use than its current use because of the development restrictions imposed by the provisions of the SSDA.

94 At the same p.90, in Adelaide Clinic v Minister for water resources, the Respondent writes: “the most advantageous use of the subject land having regard to planning and all other relevant factors affecting its present and future potential.” We submit that in the current case the Respondent has only had regard for planning controls but has disregarded the other relevant factor that the land is a Strata Parcel subject to the restrictions of the SSDA.

95 At p. 94, the Respondent criticises the valuation method used by Mr Perry.

96 At p. 95 the respondent writes that: “there are three common comparable sales in close proximity to the subject land, the same Zoning as the subject and in close proximity to the base date.” The

problem with this is the fact that the three sales are not sales of Strata Parcels. The three sales are not subject to the restrictions of the SSDA. The sales are not comparable.

97 The residual value method used by Mr Perry is much more accurate and reliable since it utilises sales from comparable Strata Parcels.

98 At p.99, 100 and 101, the Respondent further attacks the valuation of Mr Perry. We submit that Mr Perry is correct in his approach. He has valued the land as vacant land removing the value of the improvements from the gross value of the property. He has used truly comparable sales from other Strata Blocks. He has correctly valued the land according to its existing GFA since no further development of the land is possible since the land is a Strata Parcel and is subject to the restrictions of the SSDA.

99 At p. 107, 108 and 109 the Respondent dismisses the three cases mentioned by the Appellant [Applicants]-

1. *Limina Holdings Pty Ltd ITF Galileo Superannuation Fund v Valuer General of New South Wales* [2019] NSWLEC 110 (7 August 2019}.

2. *Robert Croft Holdings v VG* {NSWLEC 2018 }.

3. *Valuer-General v Fivex Pty Ltd* {2015] NSWCA 53 (17 March 2015.

100. All *three* cases illustrate the principle that valuing properties according to potential GFA based solely on the Zoning of the land, regardless of whether that GFA can be realised, is not appropriate.

101. In *Limina Holdings Pty Ltd ITF Galileo Superannuation Fund v Valuer General of New South Wales [2019] NSWLEC 110 (7 August 2019)* the Court found that the site was too small to be developed to its maximum available GFA according to Planning controls.

102. In *Robert Croft Holdings v VG (NSWLEC 2018)* the Court found that the physical characteristics of the site and lack of adequate access made it unsuitable for development and reach its maximum GFA under Planning controls.

103. In *Valuer-General v Fivex Pty Ltd [2015] NSWCA 53 {17 March 2015)* the Court found that the GFA was higher than the maximum GFA allowed by planning controls but valued the site at that higher GFA.

104. All three cases resulted in valuations based on a GFA which was at variance from the GFA derived from the Zoning alone.

105. All three cases illustrate the principle that you cannot value according to its Zoning alone

106. Full and careful consideration needs to be given to the full range of permissions, restrictions and prohibitions that may apply to a particular property.

107. The respondent has dismissed *Limina Holdings Pty Ltd ITF Galileo Superannuation Fund v Valuer General of New South Wales [2019} NSWLEC 110 (7 August 2019)* as a *"standard merits matter."*

108. This is correct, it is a standard merits case and supports our contention that the particular merits of a case need to be considered. But the Respondent has glossed over what Justice Sheehan says at 113:

> **I infer from the writings of judges as distinguished as Dixon CJ, Isaacs J, Wells J, Else-Mitchell J, Hill J, and Biscoe J, the importance of recognising, for the purposes of identifying the highest and best use of relevant land, underpinning concepts of feasibility, realism, practicality, and reasonableness, reviewed in the context of all the "circumstances" of the land - what Jacobs J called the "planning and all other relevant factors affecting its present and future potential."**

109. This a very powerful statement and a distillation of valuation doctrine enunciated by so many distinguished authorities. It summarises in a succinct manner the major valuation principles.

110. t is not feasible or realistic or practical or reasonable to value 45-49 Gladstone St as a development site as the Respondent has done. The Respondent has ignored the important *"other relevant factor"* that the land is a Strata Parcel, subject to the SSDA restrictions and therefore cannot be developed.

111. The Respondent has only considered the Zoning of the land and ignored other important controls such as Strata Laws.

112. The Respondent in its valuation report and in its written submission has failed to address the restrictions of the SSDA which apply to the subject since it is a Strata Parcel.

113 The restrictions of the SSDA apply to this land as another set of controls in addition to the normal Planning Controls.

114 Section 3 of the SSDA sets out the main objectives of the SSDA. At 3 (c) the objective stated is "the variation, termination and renewal of strata schemes."

115 The SSDA is the equivalent of another "Development Control Plan" to which Strata Parcel is subject.

116 The Respondent has only considered Planning Controls in its valuation approach.

117 **Part 10 of the SSDA is specifically directed at land such as the land of the subject property. It specifically governs the development of Strata Parcels.**

118 **It appears as if the Respondent does not consider that the SSDA applies to the subject property.**

119 **If the SSDA does not apply to the subject property, where is it meant to apply?**

120 The subject property has been valued by the Respondent as a site suitable for development. This is not possible because of the provisions and restrictions of the Strata Scheme Development Act. It therefore cannot be valued as a development site.

121 Before it can be considered a development site, the Strata Scheme needs to be terminated. To terminate the Strata Scheme, a Strata Renewal Plan needs to be approved by at least 75% of the Lot owners. Once this occurs, Court proceedings need to take place and an order to terminate the Strata Scheme can be issued by the Court if it is appropriate to do so.

122 This valuation relates to the 1stt July 2018. The site could not have been developed on that date and therefore it should not be valued as a development site at that date.

123 To develop the site a developer needs to **acquire** the site. This was not possible at valuation date since the Strata Scheme had not been terminated.

124 The valuation for 2017 for Lot 3 is 230000. If the site had not been re-zoned, the valuation according to the Component report would have been $232,000 for 2018. This amount, $232,000 would have been far more realistic and appropriate.

125 The land could not be **used** (from VLA 1916) as a development site at valuation date. 126 GFA proposed in the respondent valuation is theoretical- based only on planning controls. It is not materially possible since the subject land is a Strata Parcel.

127 Valuation is used for taxation and rating purposes- applicant has been assessed as having GFA of 420 sqm. But they are unable to exercise or use that amount of GFA. They are being taxed for something that they do not have.

128 The best possible use of a land site is governed by multiple factors- its Zoning, its Heritage status, its physical shape- size, slope, street frontage, its contamination status, financial factors.

129 The respondent has changed the valuation of the subject site indiscriminately, based only on the change of the Zoning.

130 In this case the provisions of the Strata Redevelopment Regulations need to be satisfied. Until that occurs, the site cannot be developed. The site needs to be valued with that factor in mind.

131 As of 1 July 2018, there was not any unanimous agreement among the owners to consolidate the site nor Court approval for its development. The site therefore needs to be valued with that consideration in mind. Once that changes, such as an agreement among all the owners, the site then can be valued accordingly.

132 As of July 2018, the title to the site was owned by the owners' corporation or, in other words, a Strata Scheme. A Strata Scheme cannot legally be developed. The Strata Scheme has to be terminated and replaced with a new Strata Scheme or other title before the property can be developed.

133 The Valuation in July 2017 was $230,000. The valuation by the Respondent in July 2018 became $636,000. It has nearly tripled. The only factor that has changed is the Zoning. The other factors, including the provisions of the SSDR, have not changed. The Respondent has failed to take that into consideration.

134 The land is vacant for valuation purposes. But the use that is envisaged for the land has to be possible. The use that is contemplated by planning laws may not be possible because of other laws - in this case the Strata Scheme restrictions.

135 We propose that land belonging to a Strata Scheme can only be valued according to the existing GFA of the that scheme. Before a new GFA can be achieved on the land the current Strata Scheme has to be terminated. Either a new Strata Scheme is created to replace the existing Strata Scheme or the current Strata Scheme is terminated and the land is sold through a collective sale. Both the above require satisfying the provisions of the SSDA.

136 Strata laws govern the possible use of the site since it is a Strata Parcel. The notion vacant land cannot overcome the restrictions of Strata laws.

137 There are Planning laws, Heritage laws and Strata laws that may apply to land. They all govern the possible use of land and they all need to be considered in any valuation exercise.

138 The laws stipulate that you need at least 75% of Lot owners to agree before any development can take place on a Strata Parcel. The laws are designed to protect the rights of individual Lot owners.

139 **Planning laws determine what and how much can be built on a Strata site**.

140 **Strata laws determine when a Strata site can be developed**.

141 The SSDA deals specifically with the development of the land. It specifies what needs to be done before a Strata Parcel can be developed.

142 The bulk of the valuation by both Hill and Robinson is made up by factoring in the valuation the consolidation of the site. This is pure speculation. Consolidation has not occurred. There is no Strata Renewal Proposal. The possibility of consolidation and development is remote.

143 The SSDA dictates the possible development of the site. The Zoning is subordinate to the provisions of the SSDA. Unless at least

75% of the owners agree to a Strata Renewal Process, development cannot take place.

144 **The land in this case bears many similarities to Heritage land**.

145 **Land affected by a Heritage order cannot be developed according to normal Planning Controls. The Heritage order needs to be lifted (or "terminated") before the land can be developed**.

146 **The land in this case is restricted by Strata laws (the equivalent of "Heritage order"). The Strata Scheme needs to be terminated, by Court order, (or unanimous agreement to a consolidation by all Lot owners) before the land can be developed.**

147 The respondent expert report is seriously flawed since it relies only on planning controls and ignores a vital statutory regulation, the SSDA, and **should therefore be dismissed**.

148 Planning controls may allow up to 5918sqm of GFA on this site but the reality is that this cannot be achieved. In the real world this site, and similar strata sites, cannot be developed. The restrictions imposed by the SSDA make it impractical to consolidate the site so that it can be developed.

149 It would be prohibitive, not just impractical, for a developer to try and entice 11 out of 14 lot owners so that this site can be developed.

150 It is obvious to see with the "naked eye" that this site will never be developed unless something unforeseeable occurs in the future, for example a calamity that would result in the destruction of the building.

151 It would be, therefore, not fair, if considered in a detached manner, that this Strata Block is classified as a "development site."

152 The difficulty in developing sites such as this is reflected in the market values- the prices of units in the area have not changed materially.

153 **In the real world, this site cannot be developed**.

154 It is reflected in the fact that more than three years have elapsed since the change in Zoning and yet there is no sign that even one of the multitude of strata blocks in the area has been developed. Despite the "appetite of the market for residential unit development sites" as described by Mr Hill in his report, the developers are clearly avoiding strata blocks as development sites.

155 It is not reasonable to consider strata blocks as development sites when there is no demand for them as development sit es.

156 It is obviously not financially feasible for developers to try and develop strata blocks. It is easier for them to consolidate adjoining properties where fewer owners are involved and it is much easier to entice the owners to sell since the uplift or windfall gain for the owners is much greater.

157 It is not reasonable for the land value of a unit to be greater than the market value of the unit. Land values are usually derived from market sales after deducting the value of the improvements. If the land value is greater than the market value, somewhere in the derivation of that land value there must be a faulty construction .

158 The Respondent has ignored the provisions of the SSDA as well as other factors that may have affected the valuation.

159 Sometimes situations arise where different pieces of legislation interact.

160 In this case, Planning laws indicate that a GFA of 5918sqm is possible on the subject property.

161 On the other hand, statutory restrictions due to the SSDA limit and restrict the development of properties such as the subject property until such time as a Strata Scheme is extinguished and the Strata Development laws stop operating on that particular type of land.

162 We propose that the Strata Development laws have primacy over Planning laws in cases such as this since Strata Development laws are more specific and relevant to this type of property whereas Planning laws cover a much wider range of different type properties.

163 Even with cursory, superficial and lay examination, it is clear that development of a Strata Block, is extremely unlikely if at all possible particularly when many owners are involved.

164 **In summary, the subject property at the valuation date was (and continues to be) a Strata Parcel. It therefore was bound by the provisions of the SSDA. The provisions of Part 10 of the SSDA stipulate the conditions before a Strata Parcel can be developed. These conditions include termination of the Strata Scheme with a Court order. These conditions were not fulfilled at the valuation date. The land, therefore, could not be developed at the valuation date. This is consistent with practical and realistic considerations and financial feasibility. The land should be valued according to its existing use.**

165 Our submission is that the valuation done by Mr Perry should be adopted as the appropriate valuation for the subject property.

Valuer General's submissions

69 The Valuer General submitted that the Applicants' approach ignores long-standing principles in relation to how statutory valuation is to be undertaken under the VL Act.

Applicants' position is contrary to law – s 6A(1) and Toohey's case

70 The starting point is s 6A(1) of the VL Act. It provides:

> The land value of land is the capital sum which the fee-simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a bona-fide seller would require, assuming that the improvements, if any, thereon or appertaining thereto, other than land improvements, and made or acquired by the owner or the owner's predecessor in title had not been made.

71 The Applicants ignore the fundamental requirement that the improvements, other than land improvements (not relevant in these proceedings as there are no land improvements), are assumed to have not been made.

72 The Applicants' error is best seen in the joint report where Mr Perry states:

> In a hypothetical exercise as can be directly viewed from the Act, it is possible to assume that there are no improvements on the site; however, the subject site has 14 registered title owners of the site.

73 That approach is contrary to s 6A(1). The land must be assumed to be vacant. Where the site is vacant, there is no building. Where there is no building, there is no strata scheme. Where there is no strata scheme, there are no registered title owners of the subject land.

74 The Applicants' position is contrary to *Toohey's* case, it being long-held authority, in which the Privy Council said:

> Now, what he has to consider is what the land value would fetch as at the date of the valuation if the improvements made had not been made. Words could scarcely be clearer to show that the improvements were to be left entirely out of view. They are taken not only as non-existent, but as if they never had existed.
>
> What the Act requires is really quite simple. Here is a plot of land: assume that there is nothing on it in the way of improvement; what would it fetch in the market?

Applicants' position is contrary to law – Gollan

75 The Applicants state in their written submissions that:

> ... land belonging to a Strata Scheme can only be valued according to the existing GFA of that scheme. Before a new GFA can be achieved on the land the current scheme has to be terminated. Either a new scheme is created to replace the existing scheme or the current scheme is terminated and the land is sold through a collective sale. Both the above require satisfying the provisions of the SSDA.
>
> Strata laws govern the possible use of the site. The notion of vacant land cannot overcome the provisions of Strata laws.

76 The Applicants ignore the long-held principle that under the VL Act, you must assume a sale of the subject land: *Gollan v Randwick Municipal Council* (1961) 6 LGRA 275; [1961] AC 82 (*Gollan*) at 278.

77 In describing s 6 of the VL Act which was the predecessor to s 6A(1), the Privy Council said:

> ... The unimproved value of land is the capital sum which the fee simple of the land might be expected to realise if offered for sale on such reasonable terms and conditions as a bona fide seller would require, assuming that the improvements, if any, thereon, or appertaining thereto, and made or acquired by the owner or his predecessor in title had not been made
>
> It is not in dispute that a formula of this kind requires the making of certain hypotheses. A sale of the fee simple has to be assumed whether or not the land in question can legally be sold, and the fact that there is some lawful impediment to sale cannot be allowed to enter into the assessment of value. Similarly, it is irrelevant that the land may be so settled or encumbered that there is no single person or even combination of persons who can at the relevant date effectively transfer the fee simple. All this follows from the fact that a sale of such an estate has to be assumed. Again, the valuer must not merely treat any improvements as not being there, he must proceed on the basis that they have never been there at all (see *Tooheys v Valuer-General*).

Applicants' position is contrary to law – hypothetical sale, hypothetical parties

78 The Applicants state that:

> 8 of the 14 unit owners on the site are owner occupiers. To these people the units they occupy are their homes, not just an investment. Changing their homes and community would be a major disruption to their lives. They would be unlikely to leave based purely on financial considerations. They would be reluctant to sell. The units are tightly held. The last unit sold in the block was in November 2013.

79 The above propositions are in contradiction to *Spencer v The Commonwealth of Australia* (2010) 241 CLR 118; [2010] HCA 28 (*Spencer's* case), a long-held authority which sets out the willing buyer and willing seller principle.

80 The Applicants' position falls foul of *Spencer's* case because their position assumes a reluctant vendor.

81 What is often referred to as the *Spencer* test is:

> … the test of value of land is to be determined, not by inquiring what price a man desiring to sell could actually have obtained for it on a given day, i.e., whether there was in fact on that day a willing buyer, but

> inquiring "What would a man desiring to buy the land have had to pay for it on that day to a vendor willing to sell it for a fair price but not desirous to sell?
>
> To arrive at the value of the land at that date, we have, as I conceive, to suppose it sold then, not by means of a forced sale, but by voluntary bargaining between the plaintiff and a purchaser, willing to trade, but neither of them so anxious as to do so that he would overlook any ordinary business consideration.

82 In *Storage Equities Pty Ltd v Valuer-General* (2013) 94 ATR 431; [2013] NSWLEC 137 at [46] Craig J said:

> The hypothetical sale to be assumed for the purpose of s 6A(1) is not a sale by the person or entity who happens to own the land on the date upon which the value is to be assessed ...

83 The Applicants ignore the hypothetical nature of the sale under s 6A(1) and ignore the hypothetical nature of the parties by taking into account the circumstances of the actual registered proprietors.

84 In addition, the VL Act s 26AA(1)(b) requires that the subject land is to be valued on the assumption that it is owned by a single owner. The Applicants ignore that assumption when they state:

> In this case 11 owners need to agree. It is virtually impossible. It could be another 50 or 100 years before the site is consolidated and re-developed.19

Applicants' position is contrary to the concept of highest and best use

85 The Applicants state that:

> Basically the site is “frozen” or “sterile” - it cannot be developed. It should be valued according to its existing use.

86 That approach is contrary to the highest and best use concept. The Applicants ignore the development potential permissible under the planning controls and the market evidence of sales of sites for residential unit development.

87 There is a useful discussion of the concept of highest and best use in *Commonwealth Custodial Services Ltd as Trustee for Burwood Trust Fund v Valuer-General (NSW)* (2006) 148 LGERA 38; [2006] NSWLEC 400 (*Commonwealth Custodial*) per Biscoe J:

> 13 There is some difficulty in construing s 6A, partly because it is an artificial construct and partly because it is elliptical. Although it should be explicit, there are omissions that must be implied, including reference to

a bona-fide purchaser. In my opinion, s 6A(1), apart from its improvements assumption and land improvements exception, reflects, partly explicitly and partly implicitly, the ordinary principle of ascertaining the value of land stated in *Spencer v The Commonwealth* (1907) 5 CLR 418 at 441. That is, the value of land is the price arrived at by a willing but not anxious buyer negotiating with a willing but not anxious seller, both perfectly acquainted with the land and cognizant of all circumstances which might affect its value. In *Commissioner of Land Tax v Nathan* (1913) 16 CLR 654 at 661 the High Court held, in the context of construing land tax legislation, that the ordinary principle of ascertaining the value of land is as stated in *Spencer v The Commonwealth* unless a new special rule of law is introduced by a statute which sets up some artificial standard.

14 In my opinion, under s 6A(1) land must be valued on the basis that the hypothetical purchaser is purchasing the land for the purpose of its highest and best use, which may not be its current use. “The law is quite plain that under the Valuation of Land Act the unimproved value of land must be based upon the best or most profitable potential use and if the land was legally capable of being subdivided for residential purposes ... it was proper to value it on a subdivisional basis”: *Spicer v Valuer-General* (1963) 10 LGRA 319 at 320 per Else-Mitchell J. In *Stubberfield v Valuer-General* [1991] 1 Qd R 278 at 283 Carter J said: "It is also a well recognised principle that land be valued for its highest and best use. What it can best be used for will be reflected in its true market value which takes account of any detriment the land possesses relevant to its use as well as any potential it has for its present or other use. Again the relationship between value and land use is immediately apparent". In *Goode v Valuer-General* (1979) 22 SASR 247 at 256, 61 LGRA 424 at 434 Wells J said that: "The sale referred to in the definition of unimproved value is a sale of the land in a market where at least some of the potential buyers are interested in making a use of the land that will realise the highest price”. Similarly in relation to compulsorily acquired land, “It is now settled, and for good reason, that a dispossessed landowner should be compensated for the value of his or her land on the basis of its highest and best use": *Boland v Yates Property Corporation Pty Ltd (*1999) 167 ALR 575 at 649 [271] per Callinan J.

15 There is no statutory definition of “highest and best use”. It has been described in the High Court as “the most advantageous purpose for which [the land] was adapted”: *Spencer v The Commonwealth* (1907) 5 CLR 418 at 441 per Isaacs J. It “is the present value alone of such advantages that falls to be determined”: *Cedar Rapids Manufacturing and Power Co v Lacoste* [1914] AC 569 at 576 per Lord Dunedin. In *Park v Allied Mortgage Corporation Ltd* (FCA, 5 July 1995, unreported) Hill J said at [70]: “As Spencer's case itself makes clear the valuation must proceed by reference to the best use of the property. For this purpose the valuer will take into account not only the present use to which the land is applied, but any more beneficial use to which it may reasonably be applied. This is the process which a purchaser

negotiating to purchase the property would undertake. Thus, it is not inappropriate in valuing property to take into account a potential development of the property, for among the range of hypothetical purchasers can be assumed to be a person who would undertake such a development as would maximise the usage of the land". In *Adelaide Clinic Holdings Pty Ltd v Minister for Water Resources* (1988) 65 LGRA 410 at 415 (SC/SA) Jacobs J said:

> Common experience shows that land ideally suited for commercial development will fetch a higher price per unit of area than residential land, but it does not follow that the highest and best use of all land is a commercial use, for the highest and best use means exactly what it says - the most advantageous use of the subject land having regard to planning and all other relevant factors affecting its present and future potential. The first task of the valuer is to determine what that use is and then to value the land on that basis. It is not appropriate to determine the highest and best use by reference only to value.

88 Mr Perry says that to achieve the highest and best use all apartments have to be acquired at the same time and this is not physically possible. That proposition is not correct. It is contrary to the assumptions that have to be made when undertaking a statutory valuation under the VL Act.

89 Mr Perry states of Mr Hill's approach at par 32 of the Joint Report: "I argue that his view [is] as a pure hypothetical development site*"*. Mr Hill's approach is the conventional approach to the concept of highest and best use for a statutory valuation under the VL Act.

90 Mr Perry's residual land value methodology should not be accepted as the comparable sales method is the most widely accepted method of determining market value: *Barrett v Valuer General* [2015] NSWLEC 1141 at [35] per Parker AC and Maston AC.

91 Further, Mr Perry erroneously based his approach on the existence of 14 units and the actual ownership of the site. This results in an analysis based on a substantial underdevelopment of the site which does not satisfy the highest and best use requirement.

92 Mr Perry's approach to the comparable sales is also flawed as he takes into account that the property is subject to an owners' corporation (at p 12).

93 Mr Hill sets out his criticism of Mr Perry in the Joint Report, particularly his use of the residual land value method which is not the preferred and conventional method of valuation.

Cases relied on by the Applicants

94 The Applicants referred to *Pyntoe Pty Ltd* & *Anor v Valuer General of New South Wales* [2012] NSWLEC 1201. The paragraph cited by the Applicants is not in context. The Court was considering the percentage differences for development approval.

95 The Applicants referred to *Limina Holdings Pty Ltd ITF Galileo Superannuation Fund v Valuer General of New South Wales* [2019] NSWLEC 110 (*Limina*). There is no issue of principle relevant to these proceedings. The case was a standard merits matter with competing planning and valuation evidence. The Court rejected the respondent's argument that the highest and best use of the subject land was as part of a land banking exercise, aimed at its eventual amalgamation with nearby lots, with a view to a major multi-storey development. The rejection of that development scenario turned on the Court's preference for the evidence of the applicant's planning and valuation experts.

96 The Applicants referred to *Robert Croft Holdings Pty Ltd v Valuer General* [2018] NSWLEC 190 (*Robert Croft Holdings*). The case was a standard merits matter with competing planning and valuation evidence. There is no issue of principle relevant to these proceedings.

97 The Applicants referred to *Valuer-General v Fivex Pty Ltd* (2015) 206 LGERA 450; [2015] NSWCA 53 (*Fivex*). That case involved a question about the statutory construction of s 6A(1) and (2) where the FSR was greater than the local environmental plan allowed. There is no issue of principle relevant to these proceedings.

98 In *Fivex* the issue was the relationship between subss (2) and (1) in s 6A. No such issue arises here and in fact the Applicants' approach is contrary to *Fivex*.

Consideration

99 The Applicants' case is novel. No example was identified of any jurisdiction in Australia adopting the approach to valuing vacant land as required by the VL

Act, or equivalent, on which a building owned through a strata scheme is located contended for by the Applicants or their valuer Mr Perry.

100 As the application of ss 6A(1) and 26AA arises on the Applicants' case, it is necessary to firstly consider the statutory construction of these sections in the context of the VL Act. Principles of statutory construction require that where words are plain and unambiguous they should be given their ordinary and grammatical meaning: *Cooper Brookes (Wollongong) Pty Ltd v Federal Commissioner of Taxation* (1981) 147 CLR 297; [1981] HCA 26 (*Cooper Brookes*) at 305 (Gibbs CJ) cited in *Roden v Bandora Holdings Pty Ltd* (2015) 213 LGERA 103; [2015] NSWLEC 191 at [42]. The words "of a statute" are to be considered in their context*: Project Blue Sky Inc v Australian Broadcasting Authority* (1998) 194 CLR 355; [1998] HCA 28 at 381-382 (McHugh, Gummow, Kirby and Hayne JJ) cited by *Minister Administering the Crown Lands Act 1989 v New South Wales Aboriginal Land Council* (2018) 231 LGERA 145; [2018] NSWLEC 26 at [61]. More recently these principles have been described in *SZTAL v Minister for Immigration and Border Protection* (2017) 262 CLR 362; [2017] HCA 34 by Kiefel CJ, Nettle and Gordon JJ at [14] (footnotes omitted) as follows:

> The starting point for the ascertainment of the meaning of a statutory provision is the text of the statute whilst, at the same time, regard is had to its context and purpose. Context should be regarded at this first stage and not at some later stage and it should be regarded in its widest sense. This is not to deny the importance of the natural and ordinary meaning of a word, namely how it is ordinarily understood in discourse, to the process of construction. Considerations of context and purpose simply recognise that, understood in its statutory, historical or other context, some other meaning of a word may be suggested, and so too, if its ordinary meaning is not consistent with the statutory purpose, that meaning must be rejected.

101 Section 33 of the *Interpretation Act 1987* (NSW) requires a construction which promotes the purpose or object of an Act over one which would not. The VL Act does not have a specific objects section. For this matter the key task underpinning the application of s 6A(1) is the requirement that the Valuer General ascertain the land value of each parcel of land in NSW each year as required by s 14A.

102 As will become clear below, the Applicants' approach, if correct, would require words to be implied in the VL Act. Considering situations in which statutory text may contain "implicit words", Gageler and Keane JJ (in dissent on the outcome of the case) in *Taylor v Owners - Strata Plan No 11564* (2014) 253 CLR 531; [2014] HCA 9 (*Taylor*) at [65] described the task of statutory construction as involving the attribution of legal meaning to statutory text, read in context. Their Honours went on to say (citing *Cooper Brookes* at 310-311, 319-321; *MacAlister v The Queen* (1990) 169 CLR 324; [1990] HCA 15 at 330):

> Context sometimes favours an ungrammatical legal meaning. Ungrammatical legal meaning sometimes involves reading statutory text as containing implicit words. Implicit words are sometimes words of limitation. They are sometimes words of extension. But they are always words of explanation. The constructional task remains throughout to expound the meaning of the statutory text, not to divine unexpressed legislative intention or to remedy perceived legislative inattention. Construction is not speculation, and it is not repair.

103 The Applicants essentially submit that because s 26AA of the VL Act provides for the valuation of land described as a strata parcel on a certain assumption about ownership, the SSD Act must come into play in the application of the VL Act. Section 26AA is a machinery provision which provides that a strata parcel of land is to be valued as if it has one owner. There is no mention of the SSD Act in the VL Act. Nothing in s 6A(1) or s 26AA or any other section of the VL Act states explicitly that the SSD Act must be considered when valuing in accordance with s 6A(1). Any such obligation can therefore arise implicitly only.

104 The Applicants do not identify precisely how application of the SSD Act can arise implicitly in the VL Act. Usually identification of where particular words should be inferred in a statute might arise in submissions. A general submission that this must be the case does not address the statutory construction requirements necessary to infer particular words. As is clear in *Taylor* amongst many other authorities cited in D Pearce, *Statutory Interpretation in Australia* (9th ed, 2019, LexisNexis Butterworths) at [2.52]-[2.56], implying words into a statute is not lightly done. In light of the principles of statutory construction outlined in [102] above, and in light of the land valuation principles relevant to the application of s 6A(1) identified by the Valuer General set out comprehensively in submissions above, there is no

basis identified by the Applicants for implying such a construction anywhere in the VL Act.

105 To similar effect, nothing explicit in the SSD Act suggests it is relevant to the application of the VL Act and there is no basis for implicitly so finding.

106 As the Valuer General submitted, the application of s 6A(1) requires an artificial hypothetical scenario to be adopted whereby a sale between a willing but not anxious vendor and purchaser are assumed considered in relation to land stripped of improvements. Section 6A(1) and *Toohey's* case have not been complied with by Mr Perry or the Applicants as the Valuer General submitted in [70]-[74] above. The dicta in *Gollan* that a sale must be assumed is not complied with, as the Valuer General submitted in [75]-[77] above. *Spencer's* case requires a hypothetical sale by hypothetical parties to be considered and also has not been complied with, as the Valuer General submitted in [78]-[82] above. Fundamentally the statutory requirement that the highest and best use be the basis of valuation has not been complied with as submitted by the Valuer General in [83] above. The Applicants' approach of seeking to interpose a real world scenario as it sees it into the hypothetical exercise required by s 6A(1) cannot be accepted.

107 In addition to these matters of valuation principle, as the Valuer General identifies in [84] above, s 26AA(1)(b) explicitly requires an assumption that land is owned by a single owner.

108 Turning to the valuation evidence as borne out in cross-examination, Mr Perry disagreed that s 6A(1) of the VL Act required a hypothetical sale between a hypothetical vendor and hypothetical purchaser. He disagreed that the exercise under the VL Act is artificial. Mr Perry considered that the owners of the hypothetical site have a huge bearing on the site's development potential and must therefore be considered. Mr Perry said he was not familiar with *Toohey's* case. Mr Perry, when asked in oral evidence for any support for his approach, referred to *Stubberfield v Valuer-General* (1991) 69 LGRA 133; [1991] 1 QdR 278 (*Stubberfield*) and *Maurici v Chief Commissioner of State Revenue* (2003) 212 CLR 111; [2003] HCA 8 at 120. Neither of the passages cited support Mr

Perry's unusual approach. *Stubberfield* is cited in the extract of *Commonwealth Custodial* relied on by the Valuer General in [87] above.

109 Mr Perry's approach to the comparable sales, in having regard to the owners' corporation and saying that the highest and best use could not be achieved because all apartments would have to be acquired, which would not be physically possible, falls foul of the assumptions required by s 6A(1) that the land be considered as vacant, and the other principles identified by the Valuer General. Taking into account that the property is subject to an owners' corporation and individual lot owners also falls foul of the requirement that the parties to the hypothetical transaction required by the VL Act are hypothetical. What should be considered is a hypothetical purchaser and hypothetical vendor, meaning no owners' corporation is to be taken into account. Consequently, Mr Perry's adoption of a GFA of only 1,516m2 (see [51] above) does not reflect the highest and best use. The 5,918.8m2, adopted by Mr Hill (in [54] above), reflects the correct highest and best use. Mr Perry's approach is incorrect. It follows that Mr Hill's orthodox approach is the correct one.

110 The direct comparable sales methodology which Mr Hill applied as his primary method is the preferred methodology for land valuation where appropriate, as identified in the Valuer General Policy (MFI-1) (see above in [47]). Where an orthodox valuation methodology which requires few adjustments such as the direct comparison approach is suitable, that methodology is preferable to one which requires a number of subjective adjustments about which minds may differ. I agree with the Valuer General's submission in [90] above that the comparable sales method is the most widely accepted method of determining market value. Three common comparable sales were relied on by both the valuers in their consideration of the direct comparison approach (see above in [46]). It does not matter that these comparable sales are not strata parcel land, the basis on which the Applicants criticised them.

111 Mr Hill's valuation relying on comparable sales is orthodox and in accordance with the well-established principles highlighted above in the Valuer General's submissions. Mr Hill's valuation should be accepted, noting that he derived a

land value greater than the original Valuer General assessment. Only the Valuer General's original assessment is pressed by the Valuer General.

112 The residual land valuation approach adopted by Mr Perry as his primary approach requires a large number of assumptions to be made. Mr Perry did not provide any references such as "Rawlinsons" (the current version being the Rawlisons Australian Construction Handbook (38th ed, 2020)) in his report to support assumptions about matters such as building costs. He stated in oral evidence that he relied on "Cordells" (presumably the Cordell Costs Guide produced by CoreLogic, available online) without providing any detail. This evidence is unsatisfactory. Further, as submitted by the Valuer General in [90] above, Mr Perry's residual valuation approach is flawed because it does not correctly address s 6A(1). I accept Mr Hill's criticisms of Mr Perry's approach, as set out in [61] above, including most relevantly that it applies the wrong GFA inter alia. I do not adopt Mr Perry's residual land valuation.

113 It necessarily follows from my findings above that all of the lay evidence relied on by the Applicants in the three statements read and emails of other landowners in the strata block of units is irrelevant. Many of the Applicants' extensive written submissions are also irrelevant as they largely focus on the SSD Act. The assertion that s 26AA of the VL Act renders the SSD Act relevant is not correct (pars 6 and 7). Consequently, the Applicants' submission from pars 6-49 are not accepted. The criticism of Mr Hill for failing to consider the SSD Act and hence a different GFA at pars 50-65 is not warranted. The criticism of the three comparable sales in par 66 is not accepted. The submissions at pars 67-74 seek to impermissibly introduce a real world scenario into what must be a hypothetical exercise. The criticisms of the Valuer General's approach at 76-98 are not accepted for similar reasons.

114 The SSD Act is not the equivalent of another development control plan for VL Act purposes, nor is the SSD Act similar to heritage controls on property. The Applicant's submissions at pars 113-165 are not accepted.

115 The three cases of *Limina*, *Robert Croft Holdings* and *Fivex* do not support the Applicants' case, contrary to pars 99-112 of the Applicants' submissions. The

Valuer General's submissions on the lack of relevance of these cases as set out in [95]-[98] above are accepted.

116 I observe that there is no statutory guarantee that land value calculated as required by s 6A(1) will be less than market value. While that is possibly an expectation in the community, there is no statutory basis for concluding that land value is always less than market value. This case provides an example where a valuable up-zoning of an area creates a substantial increase in land value from previous years. I therefore do not accept the Applicants' submissions at par 59 that market value should be higher than land value.

117 Although irrelevant to my findings, I agree with the Valuer General that the SSD Act does not inhibit development of strata schemes. Indeed one of its objectives is to facilitate such development by providing a mechanism to do so where there is not unanimous agreement of lot owners, as was required in the past. The objects of the SSD Act are extracted above in [4]. The Second Reading Speech of the Strata Schemes Development Bill 2015 (NSW) provides:

> The objects of [the Bill] are to facilitate the subdivision of land into cubic spaces, the disposition of titles, and the registration and renewal of strata schemes… The most significant reform in this bill is a new process to facilitate the collective sale or renewal of strata schemes. This proposed reform deals proactively with the issue of ageing strata schemes and enables strata owners to make collaborative decisions about their strata building. The majority of community feedback received on the strata reforms acknowledged that the decision to end a strata scheme should not require 100 per cent support of owners, provided that the process is flexible, transparent and fair. The alternative method proposed by this bill meets all those requirements. The renewal provisions are designed to empower strata owners to make a collective decision about the most important issue that will confront all strata buildings at some point: what to do with the building as it ages.

118 The Valuer General asked that costs be reserved.

Orders

119 The Court orders:

(1) The appeal pursuant to s 37(1) of the *Valuation of Land Act 1916* (NSW) against the Valuer General's determination of an objection of land value as at 1 July 2018 is dismissed.

(2) Costs are reserved.

(3) The exhibits are returned.

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